

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS GENERAL UNION, LOCAL 662

and

CITY OF MANITOWOC

Case 208

No. 67258

MA-13818

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller and Brueggeman, S.C., by **Attorney Sara J. Geenen**, 1555 North RiverCenter Drive, #202, Milwaukee, Wisconsin 53212 on behalf of the Union.

City Attorney Juliana Ruenzel, City of Manitowoc, 900 Quay Street, Manitowoc, Wisconsin 54220 on behalf of the City.

ARBITRATION AWARD

At all times pertinent hereto, Teamsters General Union, Local #662 (herein the Union) and the City of Manitowoc (herein the City) were parties to a collective bargaining agreement covering the period from January 1, 2007 through December 31, 2007. On September 5, 2007, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over a dispute concerning an allegation that the City had violated the parties' collective bargaining agreement when it temporarily transferred a junior bargaining unit Mechanic in the Department of Public Works to first shift, without first offering the transfer to Mechanic Mike Sgarioto, who had greater seniority. The undersigned was selected from a panel of arbitrators to hear the dispute. A hearing was conducted on November 6, 2008. The proceedings were not transcribed. The parties filed their briefs by December 19, 2008, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issues.

The Union would frame the issue, as follows:

Did the City violate the bargaining agreement when it failed to offer a shift change by seniority?

The City would frame the issue, as follows:

Whether seniority prevails when making a job assignment involving a shift change for a temporary time period?

The Arbitrator frames the issues, as follows:

Did the City violate the collective bargaining agreement or past practice when it temporarily transferred Mechanic James Wyss II from second shift to first shift without first offering the shift change to third shift Mechanic Mike Sgarioto on the basis of his greater seniority?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 2

MAINTENANCE OF STANDARDS

Section 1. Protection of Conditions. The employer and Union agree that they will cooperate in every way possible to promote harmony and efficiency among all Department of Public Works employees. The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials and general working conditions, which are mandatorily bargainable, shall be maintained at not less than the highest minimum standard in effect at the time of the signing of this Agreement, and conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in the Agreement.

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ARTICLE 5

**NORMAL WORK WEEK, NORMAL WORK DAY
AND NORMAL WORK SHIFT**

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Section 4. Schedule Changes. In the event it is necessary to change employees from one regular schedule of days and/or hours to another schedule for days and/or hours, the employee shall be given at least twenty-four (24) hours notice of change if possible. Work performed outside of regularly scheduled hours during the twenty-four (24) hours notice period shall be compensated at one and one-half (1½) times the normal rate of pay, whether or not total working hours for the week are in excess of forty (40) hours, unless waived by the employee. For purposes of computing work in excess of eight (8) hours per day under Section 3 of this Article, any work performed during an employee's regularly scheduled hours shall be counted toward the first eight (8) hours per day for any day on which a schedule change occurs.

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ARTICLE 7

SENIORITY

Section 1. Seniority to Prevail. Unless otherwise modified elsewhere in this Agreement, seniority shall prevail. Any disagreement concerning an employee's seniority shall be subject to the grievance procedure.

Section 2. Definitions

(a) City-wide Seniority shall be defined as the length of service with the City of Manitowoc from the employee's last date of hire to a position with the City plus such additional time as is required or granted for vacations, leaves of absence, illness or injury.

(b) Division Seniority shall be defined as the length of service with a division within the bargaining unit from the employee's last date of hire to a position within such division, including such additional time as is required or has been granted for vacations, leaves of absence, illness or injury. The bargaining unit shall be deemed to consist of **two (2)** divisions, namely **(1)** Mechanics and **(2)** Other Department of Public Works employees. Employees of each division shall be carried on a separate seniority list for all purposes including Article 10, Job Posting, or any other article. Employees in any division shall not be credited with previously earned seniority for city-wide accumulation of benefits.

Seniority for vacation, layoff, and intra-divisional posting will be end-tailed, with the seniority date for those purposes being the date on which an employee enters the division.

ARTICLE 8

JOB ASSIGNMENTS

Section 1. Job Assignments. Except as otherwise provided herein, the Employer retains the authority to make job assignments as necessary to serve Department needs, without regard to seniority.

Employees shall be permitted to give a preference as to a piece or type of equipment they prefer to operate.

The Employer will make efforts to meet these requests based on seniority, but ultimately retains authority to make assignments based on practicality, timing, training concerns and efficiency of the department and equipment. The Employer will not act arbitrarily when assigning work and the employees will only grieve if it becomes apparent that management is acting arbitrarily or in bad faith.

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ARTICLE 19

MANAGEMENT RIGHTS

Except as provided herein, all rights, privileges and prerogatives previously exercised by the Employer are retained by the Employer.

BACKGROUND

The City of Manitowoc Department of Public Works is staffed by employees who are members of Teamsters General Union, Local #662. For purposes of seniority, these employees are classified in two divisions: 1) Mechanics and 2) Other Department of Public Works employees. The job duties of Mechanics include maintenance and repair on City vehicles and machines, building maintenance, bridge maintenance and repair and guardrail installation. At the time of the events herein, the City employed eight Mechanics. Three Mechanics were assigned to the first shift (7:00 a.m. - 3:00 p.m.), three were assigned to the second shift (3:00 p.m. - 11:00 p.m.) and two were assigned to the third shift (11:00 p.m.- 7:00 a.m.).

During the week of May 28 - June 1, 2007, the Department was engaged in installing decorative lighting on the 8th and 10th Street bridges in the City of Manitowoc during the first shift, which work was assigned to the Department Mechanics. The Department Fleet Manager, Kevin Glaeser, who supervises the Mechanics, determined that an additional Mechanic was needed on the first shift during the lighting project. He approached the second shift Mechanics and asked them each, in order of seniority, if they wanted to temporarily transfer to first shift

during the week in question, but all declined. Glaeser then involuntarily assigned the least senior second shift Mechanic, James Wyss II, to work on first shift for the week. Glaeser did not offer the temporary transfer to the third shift Mechanics, both of whom were senior to Wyss.

On May 29, 2009, third shift Mechanic Mike Sgarioto filed a grievance against the City, alleging that the transfer of Wyss constituted a shift change, which should have first been offered by seniority to all eligible Mechanics. The grievance was denied by Glaeser on June 7 on the basis that the transfer of Wyss constituted a daily job assignment, which, under Article 8, Section 1, may be assigned without regard to seniority. Thereafter the matter was processed to arbitration through the contractual grievance procedure. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that the record is clear that in the past shift/schedule changes such as the one in issue here have been made by seniority. This was confirmed by the testimony of Fleet Manager Kevin Glaeser and long-time bargaining unit member Lee Hagenow. The assignment of Wyss in May 2007 was a departure from the established practice. The Union further contends that the contract is clear that seniority prevails as to all matters not specifically excluded by the contract. Thus, either by practice or by operation of contract, the change should have been offered to the Grievant.

The Union asserts that the City's action constitutes a schedule change and that Article 5, Sec. 4 controls. This language does not exclude the operation of the principle of seniority, therefore it is clear that seniority prevails according to Article 7. If, however, the move is considered a shift change, the outcome is the same because there is no reference to shift changes in the contract and, therefore, seniority still prevails. The Union disputes the City's contention that the action was a work assignment subject to Article 8. The grievance is not based on the type of work that was assigned, or the type of equipment used, but rather upon the movement of a junior employee to a different shift without reference to seniority.

To the extent that the Arbitrator concludes that the contract is ambiguous on the issue, past practice should control. In order to be binding, a practice must be 1) unequivocal, 2) clearly enunciated and acted upon, readily ascertainable over a reasonable period of time and 4) accepted by both parties. The testimony of witnesses from both sides indicates that this practice has been in effect for over thirty years and that it had been employed within a matter of weeks of the incident at issue here. Whether the City regards it as a binding practice, therefore, is irrelevant. Also, the maintenance of standards clause in Article 2 makes it clear that the City cannot reduce benefit levels or working conditions below the standards in effect when the contract was signed. Thus, the City cannot unilaterally alter or disavow a practice under these circumstances, but must do so within the context of bargaining.

The City

The City asserts that Wyss' assignment to first shift was a job assignment under Article 8, Sec. 1 and, as such, was exempt from the seniority provisions of the contract. Deb Geiger, the City Personnel; and Safety Coordinator, testified that installing bridge lighting was a job assignment and not subject to seniority. Likewise, Fleet Manager Kevin Glaeser testified that the job assignment was given to Wyss after the two more senior second shift Mechanics had turned it down. Glaeser testified that he did offer the position by seniority, but only to the second shift Mechanics because there were three Mechanics on second shift and only two on third shift. He reasoned that a Mechanic could be spared from second shift, because two would still be present, but removing a Mechanic from third shift would leave the remaining Mechanic to work alone, which would be unsafe. Further, while he could also have moved a Mechanic from second to third shift, this would not have been efficient or practical. Glaeser testified that in the past he has moved second shift Mechanics to both first and third shifts and that he has done so without favoritism.

The decision to move Wyss to first shift was based on practical considerations. It avoided creating a situation where the third shift was short-handed and it avoided disrupting all three shifts. Further, while the Grievant argued this work has been offered by seniority in the past, he acknowledged that those occasions also involved second shift, not third shift, and that they involved extended time periods, rather than temporary job assignments.

The grievance argues that shift changes must be by seniority, but at hearing the Union argued instead that this was a schedule change. It is unclear why the Union changed its position on this issue. Nonetheless, the City asserts that this is a job assignment, not subject to seniority. Here, the Grievant was moved from one shift to another, which is a situation not covered by the contract. If the change is temporary, for purposes of a job assignment, as here, then it is subject to Article 8, and seniority does not apply. If it was a permanent change it would be a new position and subject to posting under Article 10. A schedule change, on the other hand, involves changing an employees hours to overlap from one shift into another, such as for purposes of plowing snow, as was explained by Glaeser. That was not the situation here. Further, Lee Hagenow's testimony supports the City's position as to the distinction between shift changes and schedule changes.

It should also be noted that where the contract is silent, Article 19 reserves any such rights to management. Prior to the contract, management had the right to temporarily move employees to different shifts without regard to seniority. That right is, therefore, retained by management under the contract. It should further be noted that Sgarioto has worked for the City for many years and, in fact, elected a third shift position over a second shift position, presumably for economic reasons. He would have known, therefore, that Glaeser's practice for filling first shift manpower needs was to offer the shift change to second shift employees, but not to third shift employees.

DISCUSSION

In this case, the City needed an extra Mechanic working on first shift during the week of May 28 – June 1, 2007 while decorative lighting was being installed on bridges in downtown Manitowoc. The Department of Public Works Fleet Manager offered the temporary move to first shift to the second shift Mechanics by seniority and, when none volunteered to move, the least senior Mechanic, James Wyss II, was involuntarily transferred without the option having first been offered to the more senior third shift Mechanics. The issue before the Arbitrator, then, is whether the City had an obligation, either under the contract or due to existing practice, to offer the temporary shift transfer to the third shift Mechanics, and, in particular, to Mike Sgarioto, who was more senior than the second shift Mechanic that was involuntarily transferred.

I start by examining the pertinent contract language. Article 7, Section 1 states, “Unless otherwise modified elsewhere in this Agreement, seniority shall prevail.” This is a form of strict seniority clause that establishes the basic principle that a more senior employee has priority over a less senior employee in matters where they may be in competition for preferred conditions of employment. Section 2 establishes that, for the purposes of this contract, there are two types of seniority, city-wide and divisional, and, further, that the DPW Mechanics constitute a separate division for purposes of seniority. It is clear, however, that in certain specifically outlined areas seniority may be modified, or may not apply at all and, in fact, the contract does modify or eliminate the application of seniority in certain areas. One is in the area of job posting, in Article 10, where seniority prevails among minimally qualified candidates, establishing a baseline of qualification before seniority applies. Another, as noted by the City, is in job assignments, under Article 8, where Section 1 states, “Except as otherwise provided herein, the Employer retains the authority to make job assignments as necessary to serve Department needs, without regard to seniority.” Thus, it is clear that the parties have specified certain areas of practice wherein seniority is modified or disregarded and that for all other relevant purposes, strict seniority prevails.

The City argues that the transfer of Wyss was a job assignment under Article 8 and, therefore, it was permitted to assign Wyss to first shift to assist with the bridge lighting installation without reference to seniority. The City further asserts that it would be unsafe to remove one of the two third shift Mechanics and, alternatively, inefficient to transfer Mechanics from two different shifts (i.e., transfer Wyss to third shift while Sgarioto was working on first shift), so that the most reasonable course was to transfer the least senior second shift Mechanic after the more senior second shift Mechanics had turned it down.

It seems clear to me that the language regarding job assignments refers to management’s right to control the specific tasks that employees are assigned to do. The language is, therefore, task oriented, rather than schedule oriented. This is shown in the following language from Article 8, Section 1:

Employees shall be permitted to give a preference as to a piece or type of equipment they prefer to operate.

The Employer will make efforts to meet these requests based on seniority, but ultimately retains authority to make assignments based on practicality, timing, training concerns and efficiency of the department and equipment.

Thus, within any given shift, it is management's right to determine the particular tasks the employees are assigned to do, such as vehicle maintenance, guardrail installation, bridge repair, or, as in this case, bridge lighting installation, without regard to seniority. Even here, however, efforts are to be made to accommodate specific job requests by seniority. So, for purposes of this grievance, it was within management's purview to assign the task of bridge lighting installation to any Mechanic working on first shift, without regard to seniority. In my view, however, whether an employee may be transferred from another shift for the purpose of a job assignment without reference to seniority is another question and is not resolved by the language of Article 8.

There is some dispute between the parties as to whether temporarily moving an employee from one shift to another constitutes a schedule change, under Article 5, Sec. 4, or a shift change, which is nowhere referenced in the contract. The first sentence of Article 5, Sec. 4 states, "In the event it is necessary to change employees from one regular schedule of days and/or hours to another schedule for days and/or hours, the employee shall be given at least twenty-four (24) hours notice of change if possible." I am of the view that this describes the situation in this case. The language refers to change of days (to a schedule other than M-F) or a change of hours (to a schedule other than the hours of the employee's regular shift). That definition does not preclude a change from one shift to another and, since the contract is silent as to temporary shift changes, one can conclude that this language was intended to apply to such situations. In my view, a shift change would occur in an instance where an employee either bid for, or was involuntarily transferred to, another shift on a permanent basis.

Having so stated it is clear to me for a variety of reasons that schedule changes must be subject to the seniority clause. First, as the Union notes, Article 5, Sec. 4 makes no reference to seniority, either as being modified or not applicable as it pertains to schedule changes. Applying the language of Article 7, Sec. 1, therefore, the presumption is that seniority prevails. That this should be so is buttressed by the fact that the Mechanics on second and third shift are entitled to shift differentials of 25¢ and 35¢ per hour worked. Thus, moving an employee from second or third shift to first shift would result in a reduction in wage rate. If seniority did not apply, management could select any employee for such a schedule change, which could result in a senior employee being required to work for a lower wage than a junior employee, regardless of preference. This is just the type of circumstance that the principle of seniority is designed to avoid. Absent language allowing management to disregard seniority, therefore, more senior employees should have the option of deciding whether to accept a schedule change, and only if they refuse can management then impose the change on the least senior employee.

Indeed, it appears that the City accepts this concept in a modified sense, because Fleet Manager Glaeser testified that he did first offer the schedule change to the two senior second shift Mechanics and only involuntarily transferred Wyss after they turned it down. Indeed, as bargaining unit member Lee Hagenow testified, seniority has been recognized in schedule changes of this nature for at least thirty years. Thus, it appears that the City recognizes the importance of respecting seniority in such situations. By the fact that the schedule change was not offered to the third shift Mechanics, however, it would appear that management either views seniority as applying within shifts under these circumstances, or that it is still discretionary with the City to disregard seniority when it seems reasonable to do so. I do not agree.

In the first place, Article 7, Sec. 2(b) is clear that seniority is division wide and that Mechanics constitute a distinct division within the bargaining unit. There is no allowance, therefore, for classifying seniority rights within other classifications, such as shifts. Where seniority applies, it applies to all Mechanics regardless of shift. Secondly, as I have previously noted, management's action here constituted a schedule change under Article 5, Sec.4, not a job assignment under Article 8, Sec. 1, and seniority applies to schedule changes. Thus, the third shift Mechanics, including the Grievant, should have been given the option of changing schedules and going to first shift during the week in question prior to Wyss being involuntarily moved from second shift.

In so finding, I note the City's concerns regarding the possibility of third shift having only one Mechanic on duty, or the need to move a Mechanic from second to third shift. I do not see these as being insurmountable problems. As Glaeser noted, third shift typically has two mechanics and it is not preferable for various reasons to have only one Mechanic on duty. Nonetheless, the record indicates that third shift does operate with one Mechanic from time to time, due to vacations, illnesses, and the like, so it is not a situation that does not arise. Also, if having two Mechanics on third shift is deemed crucial, management could move a Mechanic from second shift, as needed. While I concede it would be more cumbersome to move two Mechanics rather than one, since the Mechanics cross-train on all tasks there should not be a significant drop in efficiency or productivity. Further, temporary inconvenience of such a nature is not, in my view, an adequate justification for departing from the principle of seniority.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby issue the following

AWARD

The City violated the collective bargaining agreement when it temporarily transferred Mechanic James Wyss II from second shift to first shift without first offering the shift change to third shift Mechanic Mike Sgarioto on the basis of his greater seniority. Since the Grievant suffered no apparent economic loss from the violation, no make whole remedy is awarded. The City is, however, ordered henceforth to apply strict seniority when making schedule changes within bargaining unit divisions under Article 5, Sec. 4 of the contract.

Dated at Fond du Lac, Wisconsin, this 21st day of April, 2009.

John R. Emery /s/

John R. Emery, Arbitrator

JRE/gjc

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